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IN THE

Supreme Court of the United States

October Term, 1965

No. 704

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

ROBERT G. BOES,
SAMUEL P. DELISI,
RENE J. GUNNING,
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Appellants,

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UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

Appellants, The Baltimore and Ohio Railroad Company, *et al.* listed in Appendix D, *infra*, p. 37a appeal from a judgment of the United States District Court for the Western District of Pennsylvania, entered on November 18, 1965, which dismissed a complaint seeking to set aside an order of the Interstate Commerce Commission, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the district court which appears in Appendix A, *infra*, pp. 1a-16a is not yet reported in the Federal

Supplement. The report of the Interstate Commerce Commission (Appendix B, *infra*, pp. 17a-30a) is printed at 323 I. C. C. 746 (1965).

Jurisdiction

This action was brought under 28 U. S. C. §§ 1336, 1398, 2284 and 2321-2325 to set aside an order of the Interstate Commerce Commission.

The judgment of the three-judge district court (Appendix A, *infra*, p. 16a) was entered on November 18, 1965, and notice of appeal was filed on January 14, 1966. The district court extended the time to docket the case in this Court to April 15, 1966.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U. S. C. §§ 1253 and 2101(b). *Interstate Commerce Commission v. New York, N. H. & H. R. Co.*, 372 U. S. 744 (1963); *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476 (1935).

Statutes Involved

Statutes involved are §§ 1(5), 15a(2) and (3) of the Interstate Commerce Act (49 U. S. C. §§ 1(5), 15a(2) and 15a(3)) and the National Transportation Policy (49 U. S. C. preceding § 1); and §§ 8(b) and 10(e) of the Administrative Procedure Act (5 U. S. C. §§ 1007(b) and 1009 (e)) as set forth in Appendix C, *infra*, pp. 34a-37a.

Questions Presented

The case before the Commission involved intense competition between railroads for the transportation of very large quantities of iron ore from Lake Erie ports to

important steel producing areas in Ohio, Pennsylvania and West Virginia. The Commission, finding that drastically cut rates of Erie-Lackawanna Railroad were compensatory, approved those rates thereby, in effect, establishing a new rate structure for all iron ore rates from all lake ports. The Commission made no finding as to the revenue effect of the reduction on Erie-Lackawanna, or on the other ore carrying railroads, or on the rate structure on iron ore.

The questions presented are these:

1. Whether, in a rail intramode* competitive rate case, the Commission may find lawful reduced rates of a railroad merely on the ground that they are compensatory without any findings of their effect on the revenues of that railroad and its competitors, and without any finding as to the effects of the reduced rates on an existing reasonable rail rate structure when these questions are properly raised?

2. Whether the enactment of § 15a(3) of the Interstate Commerce Act, which applies to intermodal competition, amended the legal standards which for many years have applied in intramode competitive railroad rate cases under §§ 1 and 15a(2) of the Act?

3. If § 15a(3) is not applicable in rail intramode competitive cases, did the Commission err in following cases controlled by that section in deciding this case which involves only competition between railroads?

Statement

Iron ore in tremendous quantities originates at mines in Wisconsin, Minnesota and the Upper Peninsula of Michigan,

* "Intermode" competition describes competition between carriers of different modes, *e.g.*, between a railroad and a water carrier, while "intramode" competition describes competition between carriers of the same mode *e.g.*, between two or more railroads.

and points outside the United States, moves to lower Lake Erie ports by vessel, and is there handled over railroad owned and private ore docks for forwarding by rail to interior destinations in Ohio, Pennsylvania and West Virginia.

For almost half a century since the Interstate Commerce Commission's decision in *Iron Ore Rate Cases,* 41 I. C. C. 181 (1916), 44 I. C. C. 368 (1917), there has been equality of rail rates from the Lake Erie ports of Erie, Pa., Conneaut, Ashtabula, Cleveland, Lorain, Huron and Toledo, Ohio, to ore consuming destinations in Ohio, West Virginia and Pennsylvania. In that decision, the Commission recognized that equalization was necessary to permit the railroads to compete with each other, to provide properly adjusted rates to the different ore consuming destinations, and provide consumers of iron ore flexibility in the use of several Lake Erie ports. The basic ex-lake iron ore rate structure involved in the proceeding was prescribed by the Commission in *Iron Ore Rate Cases, supra,* and had remained unchanged until this case except for general increases or decreases authorized by the Commission after full investigation.

The rates from the ports apply to recognized destination rate groups in Ohio, West Virginia and Pennsylvania, at which are located some of the nation's largest steel mills.

Iron ore traffic is of extreme importance to Appellants; in 1963, the last year of record, the movement of ex-lake iron ore was 21,237,539 gross tons, the most important movement of iron ore transported by Eastern District railroads (Appendix B, *infra,* p. 24a).

Erie-Lackawanna Railroad Company, by schedules filed to become effective on and after April 17, 1964, published

reductions of 20 cents per gross ton in the interstate rates on iron ore from docks at Cleveland, Ohio, to eight destinations in Ohio and seven destinations in Pennsylvania, served by Erie-Lackawanna Railroad Company and collectively by Appellants, Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, New York Central Railroad Company, Norfolk and Western Railway Company, Pennsylvania Railroad Company and Pittsburgh and Lake Erie Railroad Company.

Appellants, all of which transport large volumes of iron ore, filed petitions asking the Commission to suspend the reduced rates on the grounds that the rate cut would destroy a reasonable rail rate structure and cause an unjustified dissipation of rail revenues in violation of §§ 1 and 15a(2) of the Act (49 U. S. C. §§ 1 and 15a(2)). The consequence of Erie-Lackawanna's action would be that together Erie-Lackawanna and Appellants would suffer an annual revenue loss of approximately $4 million on ex-lake ore traffic with no competitive benefit to Erie-Lackawanna, since Appellants would be forced by competition to make the same reductions. The Commission suspended the schedules for investigation.

After hearing, at which no shipper, receiver, or other party (except Erie-Lackawanna) appeared in support of the reduced rates, Division 2 of the Commission by its report and order dated January 28, 1965 (Appendix B, *infra*, pp. 17a-30a) approved the reduced rates subject only to a technical change promptly made by Erie-Lackawanna and of no consequence in this proceeding. A petition for reconsideration was denied by the same Division 2, then acting in its appellate capacity. The reduced rates became effective April 1, 1965. Appellants' suit to set aside the

Commission's order was dismissed on November 18, 1965 (Appendix A, *infra*, p. 16a).

The Questions Presented are Substantial

This case presents important questions involving the proper statutory and case law criteria to be applied in rail intramodal competitive cases under §§ 1 and 15a(2), of the Interstate Commerce Act (49 U. S. C. §§ 1, 15a(2)). It is the first litigation of its kind to reach this Court since the enactment of § 15a(3) (49 U. S. C. § 15a(3)) as part of the Transportation Act of 1958. Directly at stake is approximately $4 to $6 million annually in rail carrier revenues. More importantly, at issue is a question of law of national importance—whether in intramode rail cases the Interstate Commerce Commission's inquiry into the lawfulness of reduced rates is completed once it is found merely that the rates are compensatory; or whether the Commission now, as prior to 1958, continues to have the duty to make findings, when the issues are raised, as to the revenue effects of the proposed reductions on the carrier proposing the rates, its competitors who challenge them and the existing rail rate structure. Resolution of these questions requires a determination whether the Commission properly followed decisions interpreting the phrase "destructive competitive practices" arising in intermodal cases controlled by the recently enacted § 15a(3) of the Interstate Commerce Act (49 U. S. C. § 15a(3)) and this Court's decision interpreting that section in *Interstate Commerce Commission v. New York, N. H. & H. R. Co.*, 372 U. S. 744 (1963).

The Commission failed to make any findings on the critical issue raised by Appellants—the adverse revenue effects of the Erie-Lackawanna reductions on the Erie-Lackawanna itself, the Appellant railroads and the reasonable rail rate structure on ex-lake iron ore. Rather, the

Commission approached this proceeding as if it were an intermodal competitive case (such as a motor carrier attacking a reduced rail rate) controlled by the provisions of 49 U. S. C. § 15a(3), thus obviating any necessity of a finding as to revenue effects.

After reviewing the factual situation and the contention of Appellants that the proposed rates violated §§ 1(5) and 15a(2) of the Interstate Commerce Act (49 U. S. C. §§ 1 (5) and 15a(2)), the Commission (Appendix B, *infra*, p. 27a), purported to give consideration to the factors set forth in § 15a(2) in considering Appellants' claims that the proposed rates violated the prohibition in the national transportation policy against destructive competitive practices since they threatened the existing rate structure. However, the Commission interpreted "destructive competitive practices" not by reference to intramodal statute and case law, but applied criteria stated in intermode competitive cases controlled by § 15a(3) of the Interstate Commerce Act (49 U. S. C. § 15a(3)) which relates to competition between carriers of different modes of transportation.

Then in reaching its basic conclusion (Appendix B, *infra*, p. 28a), (that where a rate is compensatory, there is no basis for a finding that it contravenes the national transportation policy) the Commission relied on eight* cases,

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* *Missouri Pac. R. Co. v. United States*, 203 F. Supp. 629, 634 (1962).
Interstate Commerce Commission v. New York, N. H. & H. R. Co., 372 U. S. 744, 759 (1963).
Freight, All Kinds, L. C. L. Container Charges—U. S. A., 323 I. C. C. 468 (1964).
Meats, Fruits, Vegetables—TOFC—Transcontinental, 316 I. C. C. 583, 592 (1962).
Cement from Pennsylvania to New Jersey, 318 I. C. C. 217, I. C. C. 215 (1962).
Various Commodities from or to Arkansas and Texas, 314 I. C. C. 215 (1961).
Sugar, South to Ind., Ohio River, Intermediate Point, 319 I. C. C. 782 (1963).
Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 325 Affirmed *per curiam*, 379 U. S. 6 (1964).

all involving competition between different modes of transportation and all controlled by § 15a(3) of the Interstate Commerce Act (49 U. S. C. § 15a(3)). The Court (Appendix A, *infra*, p. 14a) after agreeing that the legislative history and the cases show that § 15a(3) was intended to apply only to intermodal competition, nonetheless concluded that the Commission had not applied § 15a(3), despite its use of those criteria in deciding the case. This was an obvious error by the court since applying the criteria of the statute is the same as application of the statute itself.

By its decision, the court below has erroneously permitted the application of § 15a(3) (49 U. S. C. § 15a(3)) to this case. When proposals culminating in the enactment of § 15a(3) were under consideration, the Commission** strongly urged Congress to make § 15a(3) applicable to intramodal rate disputes, but Congress rejected the Commission's proposal. That the Commission nevertheless persists in its views and acts as though Congress had adopted them is shown by the following quotation from a lecture given by Commissioner Tierney (who wrote the report here involved) on April 21, 1965, shortly after handing down the Commission's decision:

> * * * Of particular importance to recent innovations in ratemaking was the amendment to § 15a, in 1958, when Congress added paragraph 3 as a policy guideline for the Commission respecting the exercise of its minimum rate powers. In adding paragraph 3, it was the intention of Congress, as clarified by the Supreme Court in the well-known *New Haven*[1] case, that carriers be allowed greater freedom to meet the competition of other modes; or, stated differently, that there be a minimum of interference with carrier managerial discretion to exploit inherent advantages

** See report entitled "Ratemaking Rule—I. C. C. Act." Hearings before the Senate Committee on Interstate and Foreign Commerce, 85th Cong. 2d Sess. May 1958, particularly pages 168-169; 177-188.

through pricing. *And it is not unreasonable to construe congressional intent as encompassing intramodal competition as well.*[1] (Emphasis supplied.)

[1] *Interstate Commerce Commission v. New York, N. H. & H. R. Co.*, 372 U. S. 744.

The Commission (and the court) completely ignored the fact that prior to the instant decision the Commission had consistently held with court approval that part of its duty under §§ 1 and 15a(2) in rail intramode cases was the preservation of carrier revenues and just and reasonable rate structures by disapproving rates, which, although compensatory, would adversely affect those rate structures and revenues. The Commission stated repeatedly prior to the instant decision, that its authority under § 15a(2) (whether under the Transportation Act of 1920 or the amendment of June 16, 1933) was not confined to situations where the proposed rates were below a compensatory level. In fact, the Commission so held squarely in respect to the very ex-lake iron ore rate structure here in issue.

In *Trunk Line and Ex-Lake Iron Ore Rates*, 69 I. C. C. 589 (1922), proposed *reduced* rail rates, even though compensatory, were ordered canceled on findings that they were unreasonable because of their effect on the rate structures and carrier revenues. A consistent series of cases thereafter affirmed the principle in rail intramode competitive cases that reduced rates even though compensatory would be held unlawful under § 1 considered in the light of § 15a (2) if the reduction would result in unnecessary dissipation of carrier revenues and adverse effect on an existing rate structure. *Ex-Lake Iron Ore From Chicago to Granite City, Ill.*, 123 I. C. C. 503 (1927); *Absorption of Drayage Charges*, 128 I. C. C. 405 (1927); *Ex-Ohio River Coal to Ohio*

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* Tierney, "The Commission And Innovations In Ratemaking" Volume XXXII I. C. C. Practitioners' Journal, pp. 776, 777.

Points, 185 I. C. C. 211 (1932); (modified *Bituminous Coal to Youngstown,* 197 I. C. C. 616 (1933)); affirmed *Youngstown Sheet & Tube Co. v. United States, et al.,* 295 U. S. 476 (1935).

The Commission continued to apply these principles to intramode cases after the national transportation policy was adopted in 1940. That policy included a specific directive to the Commission to:

> * * * foster sound economic conditions in transportation and among the several carriers; * * * without * * * unfair or destructive competitive practices * * *

Through 1961, the Commission held in a continuing line of cases that the lawfulness of any reduced rate in a rail intramode competitive case must be determined in part by its revenue effects on the involved rail carriers. *Coal, Pennsylvania to Ohio for Transshipments by Water,* 298 I. C. C. 281 (1955); *Reduced Handling Charges on Iron Ore, Marquette, Michigan,* 314 I. C. C. 347 (1961). In 1962, the Commission successfully defended a decision where it had exercised its "predictive judgment" and found that proposed reduced rates would cause an actual reduction in net revenues of the rail carriers and ordered them canceled. *Phosphate Rock, Points in Florida to Virginia,* 313 I. C. C. 495 (1961). This decision was affirmed in *Atlantic Coast Line Railroad Company v. United States,* 209 F. Supp. 157 (S. D. Fla. 1962).

Despite this 42 year history of statutory and case law relating to rail intramode competitive cases, the Commission without reason or explanation failed to make any findings as to revenue effects of the reductions on the affected rail carriers; instead it based it decision on the fact that the proposed rates were compensatory and thus not a destructive competitive practice under § 15a(3) intermodal competitive principles.

The Court Erred In Concluding That The Commission Found That Appellants Would Not Be Required To Meet Erie-Lackawanna's Rate Reductions

Appellants urged the court below to find that the Commission erred as a matter of law in failing to follow §§ 1, 15a(2) of the Interstate Commerce Act (49 U. S. C. §§ 1, 15a(2)) and the national transportation policy (preceding 49 U. S. C. § 1) since these required the Commission to make findings in this rail intramodal case whether the proposed reduced rates, even though compensatory, might be unlawful by reason of their adverse effect on the rail carrier revenues and a reasonable rate structure. This was a material issue squarely raised by Appellants, and a finding thereon was required by the Administrative Procedure Act (5 U. S. C. § 1007(b)). The court below should have set aside the Commission's decision because of its failure to make any such findings (§ 10e Administrative Procedure Act, 5 U. S. C. § 1009(e)).

The court below rejected Appellants' argument by reaching a completely erroneous conclusion, namely that the Commission had made a specific finding that the appellants "* * * would not be required * * *" to reduce their rates because of the limited effects of the Erie-Lackawanna reductions (Appendix A, *infra*, pp. 13a-14a).

It said (Appendix A, *infra*, pp. 13a-14a):

> * * * The commission noted that the definition of 'destructive competitive practice' does not appear in the national transportation policy or elsewhere in the Act, and observed, after discussion, that where a rate is compensatory, there is no basis for a finding that it contravenes the national transportation policy. But that statement must be read in the light of the fact *that the Commission had already found* that because of the physical limitations on Erie-Lackawanna dock facilities, the amount of iron ore traffic which it could divert from the other railroads would necessarily be

> likewise limited and that the plaintiffs, therefore, would not be required to counter the corresponding reductions in rates.* (Emphasis supplied.)

The Commission's report does not make any such finding. All that the Commission did, in discussing this critical issue of whether in fact the Appellants would reduce their rates and thus restore the competitive relationship, was to recite—without any indication of endorsement—the position of Erie-Lackawanna, and the contrary position of Appellants.

Erie-Lackawanna itself recognized the necessity of Appellants' meeting its reduced rates since it formally offered to join (where it acted as a connecting carrier) the Appellants in reducing rates from docks served by them, yet it predicated its estimate of attracting additional ore traffic under the proposed rates on an assumption that the other railroads would not reduce the rates from their docks.

This self-contradictory position of Erie-Lackawanna was recited by the Commission as follows (Appendix B, *infra*, p. 20a):

> * * * The respondent stands ready to join the protestant railroads in similar rates from other Lake Erie ports to these destinations, as well as other points which respondent serves as a participating carrier in joint single-car rates.
>
> The purpose of the lower multiple-car rates is to place respondent in a better position to compete for a greater portion of the decreasing volume of iron ore traffic transported in smaller vessels to Lake Erie ports, and thereby improve its financial condition. Considering various disadvantages involved, such as dock limitations, and scheduling of ships, the bunching of vessels because of weather conditions, and the trend to larger ships, respondent nevertheless hopes to attract an

* At page 14 of its opinion, the Court again read such a finding in the Commission's decision (Appendix A, *infra* p. 10a).

> additional million or more tons of ore under the proposed rates. This estimate is predicated upon an assumption that other railroads would not reduce the rates from their docks.

Later the Commission paraphrased the "hopes" of Erie-Lackawanna and referred to *Erie-Lackawanna's prediction* that Appellants would not have to reduce their rates in the following language (Appendix B, *infra*, p. 28a):

> By its new rates, the respondent hopes to increase its participation in the iron ore traffic and thereby gain, not lose, revenues. In view of the physical limitations on the amount of ore it can handle, *respondent predicts* that protestants will not have to reduce their rates to become competitive. If the other rail carriers counter with a corresponding reduction, it may be that respondent's proposal will fail in its purpose. But in the circumstances here presented, we cannot conclude that those rates constitute a destructive competitive practice. * * * (Emphasis supplied.)

These statements of Erie-Lackawanna's position or argument were not findings by the Commission; and the court below could not make them findings of fact. A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is required to set aside the administrative action. *Securities & Exchange Commission v. Chenery Corp.*, 332 U. S. 194, 196 (1947).

Conclusion

This appeal presents questions of substantial importance in the administration of the Interstate Commerce Act and probable jurisdiction should be noted.

Respectfully submitted,

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April 15, 1966.

APPENDICES

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Appendix A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE BALTIMORE AND OHIO RAILROAD COMPANY, BESSEMER AND LAKE ERIE RAILROAD COMPANY, LEHIGH VALLEY RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, READING COMPANY and WESTERN MARYLAND RAILWAY COMPANY,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Defendants,

and

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervening Defendant.

Civil Action No. 65-348.

OPINION.

Before: Staley, Circuit Judge, Willson and Rosenberg, District Judges.

WILLSON, District Judge.

The complaint in this case was filed on March 31, 1965. This three-judge court was duly convened by an order of the Chief Judge of the Circuit. In the complaint it is stated that this civil action is one to enjoin, suspend, annul and set aside a report and order of the Interstate Commerce

Commission in a proceeding before the Interstate Commerce Commission known as Investigation and Suspension Docket No. 8095, Iron Ore, Cleveland, Ohio, to Ohio and Pennsylvania, 323 I. C. C. 746. The proceeding before the Commission arose as a result of schedules filed by Erie-Lackawanna Railroad Company to become effective April 17, 1964, and later, in which it was proposed to establish multiple-car rates on iron ore from Cleveland, Ohio, to eight destinations in Ohio and seven destinations in Pennsylvania.[1] The case was referred to Division 2 of the Commission. On January 28, 1965, it filed a report and order which was served on February 12, 1965, which is the final order of the Commission in this case, as a petition for reconsideration was in due course denied. Ten competing railroads protested Erie-Lackawanna's proposed new rate schedule. Nine of the same railroads are plaintiffs in this case. In effect the final order of the Commission vacated the previous suspension of the operation of the proposed rates and permitted the filing of a new tariff by Erie-Lackawanna which became effective April 1, 1965. In the complaint it is alleged that the jurisdiction in this Court is conferred by United States Code, Title 28, Sections 1336, 1398, 2284, and 2321 through 2325.

In accordance with the practice in this Court, the case was first presented to Judge Rosenberg. It is to be noticed that on March 31, 1965, the day before the effective date of the rates, Judge Rosenberg denied plaintiffs' application for temporary restraining order. Thereafter this civil action came on for hearing before this three-judge court. It is conceded that this Court has jurisdiction of the subject matter and of the parties. Counsel have been heard at

[1] Destinations: Girard, Hubbard, Leetonia, Mansfield, Niles, North Warren, Warren, and Youngstown, Ohio; Farrell, Franklin, Greenville, New Castle, Sharon, Sharpsville, and West Middlesex, Pa.

oral argument, and their briefs have been duly considered. It is well at this point to emphasize that there is no dispute of any substance as to the factual background with respect to the evidence received by the Commission and with respect to the orders entered by the Commission. The contention is made, however, that the Commission acted without making proper findings, and that it erred as a matter of law in its conclusions.

Since 1916, all the railroads involved in this case have charged a uniform tariff on iron ore moving on their lines from Lake Erie ports southward to the steel mills in Ohio and Pennsylvania. It is a matter of common knowledge that iron ore from the Mesabi Range is carried across the lakes by ore vessels to various docks on lower Lake Erie and thence by rail to the steel mills. A uniform tariff rate has been in effect since the order of the Commission entered in *Iron Ore Rate Cases*, 41 I. C. C. 181 (1916), 44 I. C. C. 368 (1917).

This uniformity in the rate schedule for iron ore moving southward by rail was upset when Erie-Lackawanna filed its new rate schedule on multiple-car shipments. Single car shipments are not affected. The proposed rates are subject to a minimum of 10,000 gross tons per shipment, and, for each car, the marked capacity thereof. Each shipment must be tendered at one time and move from one consignor to one consignee. Upon protests being filed by ten railroads, the operation of the schedules was suspended until November 16, 1964, and voluntarily postponed thereafter until the final order of the Commission entered February 12, 1965. In a nutshell, the reduction in the rates filed by Erie-Lackawanna amounts to 20 cents a ton below the prior rates as most shipments as a matter of practice are necessarily over 10,000 gross tons.

The report of the Commission in this case, "Investigation and Suspension Docket No. 8095, Iron Ore, Cleveland, Ohio, to Ohio and Pennsylvania," 323 Interstate Commerce Commission Reports, pages 746 through 755, with two pages of appendices is in evidence.

It is to be noticed that no shipper or receiver of iron ore appeared before the Commission or filed a protest; it is well also to note that the plaintiffs before the Commission stipulated that the proposed rates are compensatory.

The report of the Commission on this point is as follows:

> "At the hearing, the protestants stipulated on the record that the proposed rates are compensatory. Upon questioning of the examiner whether the rates met out-of-pocket costs or fully distributed costs, protestants replied: 'Whatever the proper cost standard is we will agree it is met by these rates.' Accordingly, the respondent did not present cost evidence in this proceeding" (p. 747).

Erie-Lackawanna has but one port facility on Lake Erie, and that is situate at Cleveland. Its proposal is to establish new multiple-car rates from Cleveland to the 15 destinations served by its own line. The Erie-Lackawanna has stated and the Commission has agreed that the purpose of the lower multiple-car rates is to place Erie-Lackawanna in a better position to compete for a greater portion of the decreasing volume of iron ore traffic transported in smaller vessels to Lake Erie ports, and thereby improve its financial condition. On evidence the Commission found that the volume of iron ore traffic is in general decreasing. All the railroads have suffered a decrease in this traffic, but on evidence the Commission found that Erie-Lackawanna suffered a greater decrease in proportion to other carriers because of various disadvantages involved. One main reason is because of the trend to larger ships since 1950.

However, these newer and larger ore-carrying vessels are unable to navigate the Cuyahoga River and the tributary "Old River Bed" to the site of Erie-Lackawanna dock facilities.

The Commission concluded on evidence that Erie-Lackawanna is effectively barred from competing for the ore transported in such ships, and is confined to transporting only the ore from the smaller lake vessels, which are able to navigate the river to its docks. In this connection the Commission stated that: "Considering various disadvantages involved, such as dock limitations, the scheduling of ships, the bunching of vessels because of weather conditions, and the trend to larger ships, respondent nevertheless hopes to attract an additional million or more tons of ore under the proposed rates. This estimate is predicated upon an assumption that other railroads would not reduce the rates from their docks" (p. 748).

The Commission's decision favoring the low Erie-Lackawanna rates on ore is, we believe, based upon substantial evidence. This evidence as a whole supports the finding by the Commission that Erie-Lackawanna has over the years, due to its disadvantage in dock facilities, increasingly become handicapped in securing its share of the iron ore traffic. For instance, the tables in the appendix attached to the Commission's report show significant declines in the shipments of iron ore handled by the railroads from 1947 to 1963. All the roads lost business. However, Erie-Lackawanna has suffered a greater decline than the other railroads. Table 1-A and Table 2 give the index figures. The average of 1947 through 1949 is 100. Based on the computation made by the Commission for 1961-63, Erie-Lackawanna's index figure was 43; whereas Baltimore & Ohio was 84; Chesapeake & Ohio, 103; New York Central,

78; Nickel Plate, 70, and Pennsylvania, 52. Under Table 2, in 1963, the index for all roads was 52. Thus, for the years cited in the report, Erie-Lackawanna has a greater decline except for the Bessemer & Lake Erie Railroad.

The evidence just mentioned which the Commission received and relied on in making its basic findings is briefly summarized as follows. At the hearing before the Commission, Erie-Lackawanna produced John S. Parsons, its chief engineer who gave testimony concerning the physical characteristics of that part of the Cleveland Harbor relevant to Erie-Lackawanna's ore unloading operations; that the length of the largest ship which could navigate the existing channel to its dock was 631 feet; that its dock could not handle ships of more than 700 feet in length; and that funds were not available for drastic improvements to the facilities necessary to accommodate the larger vessels.

Joseph G. Wood, vice president and manager of operations of an independent Great Lakes steamship company testified on behalf of Erie-Lackawanna that the trend in shipbuilding and use is toward vessels 730 feet in length, and that use of the Erie-Lackawanna dock, even by smaller ships, requires more tug assistance than other railroad docks, with attendant increased costs due to tug charges, including time spent waiting for available tugs.

M. F. Coffman, director of business and market research and cost analysis for Erie-Lackawanna, testified to decline in its traffic, revenue, and net income.

E. T. Butler, freight traffic manager for Erie-Lackawanna, testified to the relationship of the proposed rate reductions to rate reductions allowed in other commodities, to the decline in volume of iron ore unloaded by Erie-Lackawanna at its Cleveland dock, the comparison of this

decline in volume with the volume handled elsewhere, and the reasons that Erie-Lackawanna felt required the rate reductions, namely, the hope of attracting a million additional tons of ore annually, and the increased total revenues resulting therefrom.

The protesting railroads before the Commission offered the testimony of five witnesses. These witnesses generally speaking testified as to the effect of the proposed Erie-Lackawanna rates on the general rate structure of the other railroads.

For instance, plaintiffs' first witness was W. R. Noll, manager of pricing of coal and ore of the New York Central Railroad, who testified to the amount of iron ore carried annually by the plaintiffs and the revenue derived therefrom, that the largest movement of iron ore by United States railroads takes place between lower Lake Erie ports and the interior, and that reduction in rates, if initiated by Erie-Lackawanna, would of necessity be required of the other railroads, with the result that corresponding losses of revenue would severely affect the financial condition of the plaintiffs; that the Erie-Lackawanna rates would apply not only from its own dock, but from private docks as well and thus increase the competitive pressure on the plaintiffs to reduce their rates; that no increase in volume could be anticipated by plaintiffs even with rate reduction, so that they would be performing the same services for less revenue, a situation not advisable in view of an already low rate of return of the New York Central; that if plaintiffs' rates were not reduced, they would lose business.

E. P. Cilley, the general freight traffic manager of the New York, Chicago and St. Louis Railroad Company (Nickel Plate), testified that in his opinion Erie-Lacka-

wanna's relative share of all are hauled from Lake Erie ports has not declined; moreover, that Nickel Plate's dock is not without disadvantages to the maritime user, and that any reduction in rates would result in serious loss of revenue.

R. B. Bockmiller, general freight agent of the system rate bureau of the marketing department of the Baltimore & Ohio Railroad Company, testified that hauling iron ore is an important source of revenue to his railroad, that his railroad would be forced to meet the rate reductions of Erie-Lackawanna with similar reductions, and for example, would lose thereby revenues of some $760,000.00 annually.

Miles Clipsham, chief cost analyst of the Baltimore & Ohio Railroad, testified that Erie-Lackawanna's operating revenues, relative to the operating revenues of all Eastern District railroads, have remained virtually constant.

The final protestant witness was A. L. Graburn, the manager coal traffic sales and rates, of the Pennsylvania Railroad Company, who testified that iron ore accounts for 5.6 percent of that road's revenues; that Erie-Lackawanna had exhibited willingness to join connections with other carriers in the same rate reduction in line haul rates from other Lake Erie ports to destinations where it was a participating carrier in the present rates; that destinations covered by the reduced rates were served by plaintiffs also; that plaintiffs would be required to match Erie-Lackawanna's reductions or lose business; that the effects of the rate reduction would be felt outside the area served by Erie-Lackawanna in that the existing relationship between import rates and ex-lake rates and between Atlantic Coast shipments and St. Lawrence Seaway-lake shipments would be disturbed; that plaintiffs would therefore be forced to reduce rates in their other ore movements, (all-

rail and import); that the present rates already produce nearly the lowest car-mile earnings; that the decline iron ore traffic was general; that most vessels in operation were of a size which could be handled at the Erie-Lackawanna Dock; and that there were other docks of equal or smaller size along Lake Erie.

The evidence supports the finding by the Commission that the new and larger boats cannot reach the Erie-Lackawanna Dock because of reverse bends and other impediments in the river channel between the lake harbor entrance and the dock. Even with the proposed widening of the channel under construction by the Army Corps of Engineers, Erie-Lackawanna could not accommodate 730-foot ore boats until its unloading dock is extended and the bulkhead reconstructed to allow dredging and deepening of the channel from 23 feet to 27 feet. Funds estimated at $1,653,000.00 for this construction are not presently available.

The evidence also supports the finding that Erie-Lackawanna labors under an additional handicap with respect to its docking facilities in that an ore vessel requires two tugboats because of the navigation problem in reaching its dock. The Commission found that tugboat assistance is seldom required to reach other competing Lake Erie railroad docks.

The Commission found, in short, the Erie-Lackawanna operated under disadvantages in competing for carriage of iron ore; that the proposed new rate was compensatory; and that so long as the proposed rate was not above the reasonable maximum nor below the reasonable minimum, the management of Erie-Lackawanna was at liberty to adjust the rate within that range. It concluded that the new rates were within the zone of reasonableness, and that the

carrier was authorized to "adopt such policy of ratemaking as to it seems best, absent a violation of some provision of the act. We do not sit in judgment of the wisdom of carriers' proposals, but only whether or not they would be lawful in terms of the regulatory statute" (p. 753).

In summary at this point the evidence before the Commission was that one of eleven carriers, due to physical disadvantages and handicap in its facilities, has suffered a disproportionate decline in revenue as compared to the other carriers. By its new rate it hopes to become again competitive, but it cannot attract more than its traditional share of business even considering the new rate because of the physical limitations in its facilities. As indicated, this conclusion of the Commission is in the judgment of this Court based on substantial evidence.

Plaintiffs' whole case against the Commission is succinctly stated on page 7 of their brief where it is said:

> "This decision holds that in intramode** rail cases, the Commission's inquiry into the lawfulness of rates is completed once it is found, or the parties stipulate, merely that the rates are compensatory. In this case, the Commission abandoned its power and long-recognized duty, under §§ 1-15a(2), (Interstate Commerce Act (49 U. S. C. §§ 1-15a(2)) and the national transportation policy, of preventing harmful dissipation of rail carrier revenues caused by reduction of reasonable rates. The report of the Commission did not even mention the long line of cases dealing with the Commission's duly under §§ 1 and 15a(2) or attempt to explain why it disregarded statutory and case law consistently applied by the Commission and the courts to rail intramode competition for over 40 years."

Plaintiffs charge the Commission with error of law in their brief on page 7 where they say:

> "In reaching its conclusions, * * * relied on a number of cases involving intermode** competition arising under § 15a(3) (49 U. S. C. § 15a(3)) added by the

> Transportation Act of 1958, which has no application when respondent and protestants are railroads, rather than on controlling intramode rail cases arising under §§ 1, 15a(2) and the national transportation policy (753, 754)."

Section 1(5) of the Interstate Commerce Act requires that all charges be "just and reasonable"; section 15a(2) directs the Commission, in prescribing such rates, to consider the railroad's need for sufficient revenues to provide adequate service; and the national transportation policy (preceding section 1) requires the promotion of adequate, economical and efficient service and the establishment of reasonable charges for such service without destructive competitive practices.

The Commission's report and order should stand unless on review we conclude that the Commission has misapplied the law. In examining this question, several principles are to be considered. Judicial review of administrative agency action is limited by the Administrative Procedure Act (5 U. S. C. § 1001 et seq.), at section 1009(e), to consideration of "* * * all relevant questions of law, * * * constitutional and statutory provisions, and * * * the meaning or applicability of the terms of any agency action." A court can "* * * set aside agency action * * * found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The Supreme Court has defined the scope of judicial authority to review agency decisions. In *Mississippi Valley Barge Line v. United States*, 292 U. S. 282, (1934), an I. C. C. rate case, the Supreme Court stated at page 286:

> "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made."

Further it is uncontroverted but what the decision of the Commission carries the presumption of validity. See *Waite v. United States,* 161 F. Supp. 856 (1958), and *Koppers Company, Inc. v. United States,* 166 F. Supp. 96, (1958). With the foregoing principles in mind, it is well to note that in the rate case mentioned above, *Mississippi Valley Barge Line v. United States,* the Supreme Court stated:

> "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. (Citing case.) It is not the province of a court to absorb this function to itself. (Citing cases.) The judicial function is exhausted when there is found to be a rational bases for the conclusions approved by the administrative body."

As stated above, plaintiffs charge that the Commission, in reaching its decision, erred as a matter of law in three instances: first, in failing to follow sections 1(5), 15a(2) and the national transportation policy preceding section 1 of the Interstate Commerce Act; second, in following section 15a(3); and lastly, in failing to make required findings of fact. An examination of the statute, the cases, the record and the report, demonstrates the error of plaintiffs' contention. In attempting to justify their position and thus defeat Erie-Lackawanna's proposed rate reductions, the plaintiffs have relied on the authority of decisions which although germane are not controlling. In support of their position, plaintiffs in some instances have made partial quotations from the Commission's report and in others have overlooked the plain language of the report.

The answer to the plaintiffs' first contention, that the Commission failed to follow sections 1(5), 15a(2) and the national transportation policy, is found in the Commission's report at page 753: "The factors referred to in that section [15a(2)] are related to those set forth in the national

transportation policy and *have been considered in connection with protestants' contention that the proposal threatens the existing rate structure on iron ore and is therefore a destructive competitive practice prohibited by the national transportation policy.*" [Emphasis supplied.]

On brief, plaintiffs argue that if section 15a(2) had been followed, the cases decided thereunder, notably *Trunkline & Ex-Lake Iron Ore Rates,* 69 I. C. C. 589 (1922), and *Iron Ore Rate Cases* (1916) would have compelled the Commission to disallow the proposed reduced rates. The decisions cited might support a conclusion contrary to that of the Commission in the instant case, but they do not compel such a result. The Commission's report itself gives a reason why the earlier decisions are not controlling in that the cases are distinguishable on their facts; for instance, the *Iron Ore Rate Cases* made no mention of the inaccessibility of dock facilities.

The Commission restated the standards set out in the *Milwaukee* case, *United States v. Chicago, M. St. P. & P. R. Co.,* 294 U. S. 499, 506 (1935), namely that when rates are not above the reasonable maximum, nor below the reasonable minimum, a carrier is at liberty to adjust them within this range, although it cannot be required to do so by the Commission. The Commission went on to state that the rates of Erie-Lackawanna are within that zone of reasonableness. The Commission noted that the definition of "destructive competitive practice" does not appear in the national transportation policy or elsewhere in the Act, and observed, after discussion, that where a rate is compensatory, there is no basis for a finding that it contravenes the national transportation policy. But that statement must be read in the light of the fact that the Commission had already found that because of the physical limitations on Erie-Lackawanna dock facilities, the amount

of iron ore traffic which it could divert from the other railroads would necessarily be likewise limited and that the plaintiffs, therefore, would not be required to counter the corresponding reductions in rates. The Commission concluded that on the basis of the evidence the action of Erie-Lackawanna was not a destructive competitive practice, and therefore not in violation of the national transportation policy.

Thus, it must be held that plaintiffs' contention that the Commission failed to consider section 15a(2) and the national transportation policy is without merit.

The plaintiffs' second contention, that the Commission relied on section 15a(3) in arriving at its decision in the instant case, is based upon the fact that the Commission, in its discussion of "destructive competitive practice", cited cases involving intermodal competition and the application of section 15a(3). Further, plaintiffs contend that in so relying upon section 15a(3), the Commission treated that section as modifying the law applicable in rail intramode rate cases. But the legislative history of the 1958 Amendment which introduced 15a(3) into the Act and the cases decided under this section, notably the *New Haven* case, *I. C. C. v. New York, N. H. & H. R. Co.*, 372 U. S. 744 (1963), and *Cooper-Jarrett, Inc. v. United States*, 226 F. Supp. 318 (W. D. Mo. 1964), affirmed *per curiam*, 379 U. S. 6 (1964), show that 15a(3) was intended to apply to intermodal competition. However, it is to be noted that the point in its report at which the Commission cited 15a(3) cases was in its discussion of "destructive competitive practice." The term "destructive competitive practice" is one found in the national transportation policy, which by its express language is made applicable to all other provisions of the Act. The Commission frankly stated in its discussion of "destructive competitive practice" that

"The recent cases dealing with this question have primarily involved intermodal competition, but several criteria have evolved which are relevant to the disposition of this proceeding." (p. 753).

A review of the decisions cited does not convince us that the Commission applied an improper section of a statute merely because it discussed the criteria to be considered in determining "destructive competitive practice." This Court is not disposed to find that in the circumstances here presented the Commission applied section 15a(3) to the present controversy.

Plaintiffs strongly contend that the effect of the order is to bring on a rate war between the protesting carriers and Erie-Lackawanna. But this suggestion is to some extent negated by the Commission with the inference that it will handle such a rate war upon its arising; and in effect none has occurred with the rates being in effect during one entire lake shipping season.

And finally, the plaintiffs say that the Commission has not made adequate findings in support of its decision. We disagree. It appears from the record that the Commission's order has adequate support in the evidence before the Commission, and that the Commission has found that the rates, being compensatory and not destructive, are reasonable and not a violation of sections 1(5) and 15a(2), and of the national transportation policy as set forth in the statute.

The Commission heard the issues presented by the protestants, it received evidence, and made findings and reached a conclusion. It is true that the Commission has not made its findings in seriatim form, but its findings appear in the report, as do its conclusions of law. We do not find the legal conclusions of the Commission to be erroneous.

We affirmatively find that the Commission's legal conclusions are ones permitted by the evidence which it received. We say to the Commission, as it said to the carriers, we do not sit in judgment on the wisdom of the Commission's results, but only as to whether or not its decision is based on substantial evidence, and whether it is within the terms of the regulatory statutes. We find the Commission's decision in this case to be lawful in all respects. The complaint must therefore be dismissed. It will be so ordered.

ORDER

AND NOW, November 18, 1965, for the reasons stated in the foregoing opinion, judgment is directed to be entered in favor of the defendants, The United States of America and the Interstate Commerce Commission; and defendant intervenor, Erie-Lackawanna Railroad Company; and against the plaintiffs, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company, Norfolk and Western Railway Company, The Pennsylvania Railroad Company, The Pittsburgh and Lake Erie Railroad Company, Reading Company, and Western Maryland Railway Company; and the complaint of said nine plaintiffs is dismissed.

AUSTIN R. STALEY,
Circuit Judge,

JOSEPH P. WILLSON,
District Judge,

LOUIS ROSENBERG,
District Judge.

Appendix B.

Served February 12, 1965

30232

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET No. 8095

IRON ORE, CLEVELAND, OHIO TO OHIO AND PENNSYLVANIA

INVESTIGATION AND SUSPENSION DOCKET No. 8095

IRON ORE, CLEVELAND, OHIO TO OHIO AND PENNSYLVANIA

Decided January 28, 1965

Proposed multiple-car rail rates on iron ore from Cleveland, Ohio to points in Ohio and Pennsylvania found not shown to be just and reasonable, without prejudice to the filing of new schedules in conformity with views expressed.

J. T. Clark for respondent.

Rene J. Gunning Richard J. Murphy, Edward A. Kaier, Albert W. Laisy, Henry M. Wick, Jr., Robert G. Boes, T. W. Pomeroy, Jr., and W. P. Quinn for protestants.

REPORT AND ORDER OF THE COMMISSION
DIVISION 2, COMMISSIONER FREAS, TRUCKER, AND TIERNEY

TIERNEY, *Commissioner:*

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in this proceeding. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective April 17, 1964, and later, the respondent, Erie-Lackawanna Railroad Company, proposed to establish multiple-car rates[1] on iron ore from Cleveland, Ohio, to eight destinations in Ohio and seven destinations in Pennsylvania.[2] The proposed rates are subject to a minimum of 10,000 gross tons per shipment, and, for each car, the marked capacity thereof. Each shipment must be tendered at one time and move from one consignor to one consignee. Upon protest filed jointly by 10 railroads,[3] the operation of the schedules was suspended to and including November 16, 1964. Subsequently, the effective date of these schedules was voluntarily postponed "indefinitely."

The proposed multiple-car rates on iron ore apply from respondent's Cleveland dock and storage pile, as well as from private docks at that port, to points in two oval-shaped

[1] Rates and tonnage data are stated per gross ton of 2,240 pounds, unless otherwise indicated.

[2] Destinations: Girard, Hubbard, Leetonia, Mansfield, Niles, North Warren, Warren, and Youngstown, Ohio; Farrell, Franklin, Greenville, New Castle, Sharon, Sharpsville, and West Middlesex, Pa.

[3] The Baltimore and Ohio Railroad Company; Bessemer and Lake Erie Railroad Company; Lehigh Valley Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company (the Nickel Plate); The Pennsylvania Railroad Company; The Pittsburgh and Lake Erie Railroad Company; The Pittsburgh & West Virginia Railway Company; Reading Company; and Western Maryland Railway Company. The short titles are used hereinafter.

groups somewhat parallel to Lake Erie. The first, known as the M&S Valleys group, includes 12 of the destinations, the most prominent of which is Youngstown. To these points, the proposed rate is 188 cents.[4] The present single-car rate to Valleys group points is 208 cents or 20 cents higher than the proposed volume rate. The second group includes the three remaining destinations, Leetonia, Ohio, and Franklin and New Castle, Pa. It is designated Leetonia group and is adjacent to and southeast of the Valleys group. Again, the single-car rate of 219 cents is 20 cents higher than the proposed multiple-car rate of 199 cents.

At the hearing, the protestants stipulated on the record that the proposed rates are compensatory. Upon questioning of the examiner whether the rates met out-of-pocket costs or fully distributed costs, protestants replied: "Whatever the proper cost standard is we will agree it is met by these rates." Accordingly, the respondent did not present cost evidence in this proceeding. No shipper or receiver of iron ore entered an appearance.

In *Iron Ore Rate Cases,* 41 I. C. C. 181 (1916), 44 I. C. C. 368 (1917), the Commission prescribed maximum rates on iron ore from Lake Erie ports to consuming points in Ohio, West Virginia, and Pennsylvania. While no official grouping was provided in the rail tariffs at that time, many destination points took the same rate, and the rate was generally applicable from more than one port. The Commission found that the existing grouping should not be radically changed. It did, however, slightly modify the grouping of lake ports and destination points to give greater effect to differences in distance. Rates from the ports of Erie, Conneaut, Ashtabula, Cleveland, Lorain, and Huron were

[4] Rates stated herein refer to line-haul rates only. On ex-lake ore, handling charges, stated separately, are also imposed.

equalized as between the ports, and maximum rates were prescribed on iron ore, in carloads, to various destination groups in the area including the Valleys and Leetonia groups.[5] Except for general increases or decreases authorized by the Commission, the rates established pursuant to the decisions in *Iron Ore Rate Cases* have not been changed for nearly 50 years. Nor does respondent seek to change them now. The proposal is to establish new multiple-car rates in addition to present single-car rates from Cleveland to the 15 destinations served by respondent's own line. The respondent stands ready to join the protestant railroads in similar rates from other Lake Erie ports to these destinations, as well as other points which respondent serves as a participating carrier in joint single-car rates.

The purpose of the lower multiple-car rates is to place respondent in a better position to compete for a greater portion of the decreasing volume of iron ore traffic transported in smaller vessels to Lake Erie ports, and thereby improve its financial condition. Considering various disadvantages involved, such as dock limitations, the scheduling of ships, the bunching of vessels because of weather conditions, and the trend to larger ships, respondent nevertheless hopes to attract an additional million or more tons of ore under the proposed rates. This estimate is predicated upon an assumption that other railroads would not reduce the rates from their docks.

In the report in *Iron Ore Rate Cases, supra,* there was no evidence that any railroad docks were inaccessible to any ore-carrying vessel in 1916. However, today the larger vessels docking at Cleveland are unable to navigate the Cuyahoga River and the tributary "Old River Bed" to the

[5] Youngstown (M&S Valleys) group, Leetonia group, Midland group, Pittsburgh-Wheeling group, Johnstown group. Later another group, the Monessen group, was established. (48 I. C. C. 650.)

site of Erie-Lackawanna dock facilities. Consequently, the respondent is effectively barred from competing for the ore transported in such ships. At the time of the hearing, the largest ore boat to unload at respondent's dock was the *Harry Coulby,* 631 feet in length. On brief, the parties refer to two 647-foot vessels, the *E. B. Greene* and the *J. L. Mauthe,* which subsequently unloaded iron ore at respondent's dock. Although both vessels had been in use on the lakes for a number of years, neither had previously ventured to navigate the channel to respondent's dock.

The evidence shows a definite trend since the year 1950, toward the use of larger vessels in the Great Lakes iron ore trade. The vice president and manager of operations of an independent steamship company, the Wilson Marine Transit Company, testified that their present fleet of 13 boats and 1 barge had a greater carrying capacity than the 30 boats owned by the company in 1957. The number of ore freighters of U. S. registry on the lakes dropped from 275 in 1947 to 184 in 1963. However, there has not been a commensurate decrease in carrying capacity. In 1947, the single trip capacity was 2,685,850 gross tons, and in 1963, 2,548,200 gross tons. Between 1958 and 1961, 12 American lake freight vessels were built or lengthened with overall lengths ranging between 698 feet and 730 feet. These new ships are faster and carry substantially greater cargoes. Repairs and maintenance are less, yet crew size remains approximately the same. None of these boats can reach the respondent's dock because of the reverse bends and other impediments in the river channel between the lake harbor entrance and the Erie-Lackawanna dock.

The Army Corps of Engineers is constructing a new bridge which will allow the widening of the channel limits at the reverse curve located in the vicinity of the old Willow

Avenue bridge. This project, planned since the early 1950's is expected to be completed no later than the early spring of 1965. Another reverse bend exists at the Baltimore & Ohio bridge, and the channel cannot be widened or straightened at that point to allow passage of larger boats until the bridge is removed or reconstructed. Various plans for this are under consideration, but respondent's chief engineer estimates that 5 or 6 years will be required for completion of the project. Even then, respondent cannot accommodate 730-foot ore boats until its unloading dock is extended and the bulkhead reconstructed to allow dredging and deepening of the channel from 23 feet to 27 feet. Funds for this construction, estimated at $1,653,000, are not presently available.

The respondent also refers to its handicap in competing for ore traffic handled by smaller vessels due to the extensive tugboat assistance required to enter and leave its dock. For example, one 600-foot vessel requires two tugboats to reach the Erie-Lackawanna dock and two tugboats to leave the dock, for which the steamship company incurs an expense of $960. Moreover, costly delays are frequently encountered in awaiting the tugboat's arrival. Tugboat assistance is seldom required to reach other Lake Erie railroad docks, and only one tug is normally required at departure. In good weather, no assistance is required to leave the Pennsylvania Railroad dock.

The volume of iron ore handled by respondent over its dock at Cleveland has declined substantially during the past 15 years. In 1947, 1,266,110 tons moved over respondent's dock in contrast to 862,138 tons in 1963. The tonnage handled over various railroad docks[6] at Lake Erie ports from 1947 to 1963 is set forth in table 1 of the ap-

[6] The location of the major ore docks is shown in table 3 of the appendix.

pendix hereto. Using 1947-49 as a base period, for the years 1961-63, Erie-Lackawanna's tonnage averaged 43 percent of that during the base period. During the same 3-year period, the Baltimore & Ohio's tonnage averaged 84 percent; the New York Central's 78 percent; the Bessemer & Lake Erie's, 12 percent; the Nickel Plate's, 70 percent; and the Pennsylvania's, 52 percent.[7] As indicated in table 2 of the appendix, the iron ore tonnage shipped over all the railroad docks at Lake Erie ports in those 3 years averaged 49 percent of the base period tonnage. From these statistics, it is evident that respondent's ex-lake ore tonnage has declined to a greater degree than that of the compared railroads with the single exception of the Bessemer and Lake Erie.

The respondent also submitted an exhibit compiled from annual reports, comparing the total iron ore tonnage, number of carloads, and revenue therefrom for various railroads from the year 1947 to 1963. Using the same 1947-49 base period to compute an index, the resulting percentage averages for the period 1961-63 are as follows:

	Carloads	Tons	Revenue
	Percent	*Percent*	*Percent*
Erie-Lackawanna[1]	53	56	96
Baltimore and Ohio	75	81	154
Bessemer and Lake Erie	94	89	55
New York Central	77	82	158
Nickel Plate[2]	40	45	108
Pennsylvania Railroad	94	100	172
Chesapeake and Ohio	99	108	220

[1] Includes Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company, prior to October 17, 1960.

[2] Includes Wheeling and Lake Erie Railway, prior to December 1, 1949.

Exhibits based upon Ore & Coal Exchange reports indicate an increased movement of ex-lake ore over railroad docks during the first 5 months of 1964 as compared to the

[7] See appendix, table 1-A.

corresponding period in 1963. Increased ore traffic was handled by all railroads serving Lake Erie ports, except the Pennsylvania. Respondent's volume during the 1964 period increased by 326,933 tons over a similar period in 1963. The total increase by all railroads amounted to 1,265,809 tons. The protestants point to Erie-Lackawanna's increased 1964 volume as an indication that it can compete for ore traffic under present rates. The gain, however, can be attributed at least partially to the general increase in ore traffic. In addition, the respondent filed lower intrastate rates, the same as here under consideration, with the Public Utilities Commission of Ohio at the same time it filed the proposed rates with us. The intrastate rates became effective as proposed, and the respondent has applied these lower rates on certain shipments within Ohio which have received no common carrier movement prior to the tender of such shipments at respondent's Cleveland dock.

From a tonnage and revenue standpoint, iron ore is a commodity of great importance to the railroads. During 1963, the eastern district railroads terminated 41,754,831 net tons of iron ore, 9.3 percent of the total freight tonnage terminated in that district. Protestants are the principal carriers of iron ore in the eastern district, having terminated 39,101,167 net tons of iron ore in 1963. This tonnage constituted 12.8 percent of the total tonnage terminated by protestants.

The principal iron ore movements fall into three major categories. The first, directly affected by Erie-Lackawanna's proposal, is the movement from railroad and private docks at lower Lake Erie ports to steel mills south thereof. This movement amounted to 21,237,539 tons in 1963. The second category, 4,741,786 tons in 1963, moves from mines in New York, New Jersey, and Pennsylvania

to destinations in New York, eastern Pennsylvania, Pittsburgh, and the Ohio Valley. The third category is the movement of iron ore through North Atlantic ports for transportation to interior destinations; this movement totaled 9,089,111 tons during 1963.

Due to intense competition between railroads as well as between steel companies, protestants anticipate that approval of the proposal will result in similar 20-cent reductions on other ex-lake iron ore rates. There are active ore consumers at 5 of the 15 destinations involved; namely, Farrell and Sharpsville, Pa., and Mansfield, Youngstown, and Warren (including North Warren), Ohio. Each of these destinations is served by one or more of the protestants. Witnesses for the Pennsylvania, New York Central, Nickel Plate, and Baltimore & Ohio testified that they will meet the 20-cent reduction to these points not only from Cleveland but from other ports. In 1963, protestants moved more than 3 million tons of ex-lake ore to these destinations. They express doubt that the reductions can be confined to the 15 destinations, since any change in railroad rates which benefits one steel company is followed by requests from competitors for equivalent rates. Other destinations would demand 20-cent reductions in order to preserve the present rate relationships between ore-consuming points. Iron ore moving through North Atlantic ports and ore shipped by rail from mines in the eastern United States are competitive to a considerable extent with ore moving to interior destinations on ex-lake rates. The level of these rates, therefore, may be affected by a change in ex-lake ore rates. However, there are no Commission-prescribed relationships between ex-lake rates, on the one hand, and import and all-rail rates, on the other.

Based on 1963 tonnage, the protestants estimate that a 20-cent reduction on all ex-lake iron ore rates would amount

to an annual revenue loss of $4,247,508 (21,237,539 x .20) for eastern district railroads. Reduction of other iron ore rates would result in an additional revenue loss in excess of $2 million. Data presented by the Baltimore & Ohio showed the 1963 rate of return on investment as 1.29 percent for eastern district railroads (excluding the Pocahontas region). Respondent incurred a deficit for that year. In view of the present low rate of return, the protestants are reluctant to reduce their iron ore rates.

Since other carriers have indicated that they will attempt to meet the proposed rates if they are permitted to become effective, the protestants contend that the assailed rates violate sections 1(5) and 15a(2) of the act, and constitute a destructive competitive practice in violation of the national transportation policy.

DISCUSSION AND CONCLUSION

The protestants have stipulated that the proposed rates meet the proper cost standard. When rates are not above the reasonable maximum, nor below the reasonable mimimum, a carrier is at liberty to adjust them within this range, although it cannot be required to do so by the Commission. *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 506; *Lynchburg Traffic Bureau v. United States*, 225 F. Supp. 874, 876. The rates respondent proposes are within that zone of reasonableness, and the carrier may adopt such policy of ratemaking as to it seems best, absent a violation of some provision of the act. We do not sit in judgment of the wisdom of carriers' proposals, but only whether or not they would be lawful in terms of the regulatory statute.

The protestants' arguments that the proposal violates section 15a(2) and contravenes the national transportation

policy overlap. Section 15a(2), a part of the rule of rate-making, concerns our power to prescribe rates, which is not directly involved in this proceeding. The factors referred to in that section, however, are related to those set forth in the national transportation policy and have been considered in connection with protestants' contention that the proposal threatens the existing rate structure on iron ore and is therefore a destructive competitive practice prohibited by the national transportation policy.

As the court noted in *Missouri Pac. R. Co. v. United States*, 203 F. Supp. 629, 634, the definition of "destructive competitive practices" does not appear in the national transportation policy or in the act itself. The recent cases dealing with this question have primarily involved intermodal competition, but several criteria have evolved which are relevant to the disposition of this proceeding. Something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. *Interstate Commerce Commission v. New York, N. H. & H. R. Co.*, 372 U. S. 744, 759. In that case, it was argued that approval of the reductions would lead to a rate war. The Supreme Court stated that it is not enough to rely on the possible effect of other rate reductions not in issue, a situation with which the Commission has ample power to deal if occasion arises. Nor are proposed rates unlawful merely because they threaten to divert traffic. See *Freight, All Kinds, L. C. L. Container Charges—U. S. A.*, 323 I. C. C. 468. In the latter report, at page 475, the following observation of division 2 in *Meats, Fruits, Vegetables—TOFC—Transcontinental*, 316 I. C. C. 585, 592, was cited with approval:

> "To compete is to strive for something which another is actively seeking and wishes to gain." *United States v. Union Pacific R. Co.*, 226 U. S. 61, 87 (1912). Com-

petition thus implies action and change. Disapproval of proposed reduced rates could be just as destructive of competition as approval. Obviously, a policy of ratemaking based primarily on maintenance of the *status quo* would be the antithesis of competition.

Despite alleged destructive competitive practices, it has been held in a number of proceedings that where a rate is compensatory, there is no basis for a finding that it contravenes the national transportation policy. See, for example, *Cement from Pennsylvania to New Jersey,* 318 I. C. C. 217, *Various Commodities from or to Arkansas and Texas,* 314 I. C. C. 215, and compare *Sugar, South to Indiana, Ohio River, Intermediate Points,* 319 I. C. C. 782. The same principle was enunciated by the court in *Cooper-Jarett, Inc., v. United States,* 226 F. Supp. 318, 325, affirmed *per curiam,* 379 U. S. 6 (1964). A similar finding is warranted in this proceeding.

By its new rates, the respondent hopes to increase its participation in the iron ore traffic and thereby gain, not lose revenue. In view of the physical limitations on the amount of ore it can handle, respondent predicts that protestants will not have to reduce their rates to remain competitive. If the other rail carriers counter with a corresponding reduction, it may be that respondent's proposal will fail in its purpose. But in the circumstances here presented, we cannot conclude that those rates constitute a destructive competitive practice. With respect to the effect on the rate structure, every change in rates is a disruption *pro tanto* of the previous structure. *United States v. Chicago, M., St. P. & P. R., supra.*

Multiple-car rates have been approved where they appeared to be compensatory, reasonably related to the corresponding single-car rates, and competitively justified. See *Pig Iron from Neville Island, Pa., to Louisville, Ky.,* 313

I. C. C. 771, 777, and *Rock Salt from New York to Del., Md., N. J., N. Y., and Pa.*, 313 I. C. C. 197, 203. While the exact spread of 20 cents is a judgment figure, the proposed multiple-car rates approximate 90 percent of the single-car rates, and that ratio is within the range approved in other proceedings. See *Volume Rates on Processed Meal-Midwest to Ports*, 322 I. C. C. 456, 470; *Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine*, 319 I. C. C. 344, 353. We find that the proposed rates are not unreasonably related to the single-car rates on iron ore.

One other matter remains for consideration. The protestants allege that these rates are not true volume rates because the tariffs do not require delivery at one destination only. However, we have in the past approved multiple-car rates which represented departures from the conditions normally attached to such rates, based upon the controlling circumstances and conditions. See *Volume Rates on Processed Meal—Midwest to Ports, supra.*. The tariff wording specifying shipments of not less than 10,000 tons, tendered at one time from one consignor to one consignee clearly denotes volume rates. Restriction to one destination was not included in the tariff because one shipper requires delivery at two destinations. It appears from the evidence that deliveries are ordinarily confined to a single destination. No cost evidence was adduced here because the parties stipulated that the rates were compensatory. However, it is clear that these rates were designed to apply only to shipments moving to not more than two destinations, and there is nothing of record to justify a conclusion other than that the cost stipulation is based on these facts. Therefore, we must conclude that the rates are not shown to be compensatory for shipments destined to more than two points. Accordingly, we find that the rates must be so restricted, and that the tariff schedules

under investigation are not shown to be just and reasonable, without prejudice to the republication of the schedules limiting the destinations as hereinabove indicated.

It is ordered, That the respondent herein be, and it is hereby, notified and required to cancel the schedules described in the order of the Commission's Board of Suspension, entered on April 14, 1964, on or before March 22, 1965, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, without prejudice to the filing of new schedules in accordance with the above findings, and that this proceeding be, and it is hereby discontinued.

By the Commission, division 2.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX

TABLE 1.—*Shipments of iron ore handled over railroad docks at Lake Erie ports to interior furnaces, 1947-63*

Gross tons

Year	A	B	C	D	E	F	G
1947	1,266,110	2,564,813	10,891,205	1,390,435	5,673,551	1,091,791	13,978,306
1948	1,862,260	2,907,557	11,388,027	1,365,175	6,120,057	1,713,821	14,684,909
1949	1,895,270	2,503,927	9,558,116	1,249,270	5,196,639	1,470,845	11,821,112
1950	2,215,853	2,472,390	8,315,851	1,499,248	5,471,932	1,285,223	13,388,505
1951	2,282,657	2,803,904	10,950,301	1,347,016	6,001,859	2,102,717	15,229,618
1952	2,057,909	2,391,984	9,487,993	1,134,797	5,514,173	1,887,760	12,976,025
1953	2,503,665	3,120,414	13,282,414	1,053,656	6,994,879	2,032,487	16,345,198
1954	598,531	1,571,283	7,997,575	951,034	3,379,580	1,195,272	8,654,798
1955	838,185	2,532,577	12,286,632	1,521,679	5,831,123	1,481,442	11,936,707
1956	1,365,758	2,431,658	8,586,672	1,718,153	5,071,285	1,679,620	10,499,781
1957	813,809	1,925,988	12,699,685	1,689,109	5,137,736	1,276,429	10,331,390
1958	367,259	1,516,662	4,625,758	770,816	3,856,535	894,671	6,123,486
1959	1,097,963	2,187,904	3,516,047	878,777	2,785,641	1,124,375	6,910,428
1960	839,922	2,267,905	5,163,409	1,190,654	5,058,456	1,159,884	7,501,274
1961	679,489	2,266,975	629,833	1,233,348	3,971,391	888,487	7,071,510
1962	642,011	2,030,862	1,601,178	1,249,850	4,460,270	993,161	7,024,994
1963	862,138	2,417,553	1,504,083	1,657,852	4,875,658	1,119,798	6,769,647

A Erie-Lackawanna at Cleveland.

B Baltimore & Ohio at Toledo and Lorain.

C Bessemer & Lake Erie at Conneaut.

D Chesapeake & Ohio at Toledo.

E New York Central at Ashtabula and Toledo.

F New York, Chicago & St. Louis at Huron.

G Pennsylvania at Cleveland, Ashtabula, and Erie.

Source: Ore & Coal Exchange—Cleveland.

TABLE 1-A.—*Excerpts from index based on table 1*

Index[1]

Year	A	B	C	D	E	F	G
1947	76	96	103	104	100	77	104
1948	111	109	107	102	108	120	109
1949	113	94	90	94	92	103	87
* * *							
1961	41	85	06	92	70	62	52
1962	38	76	15	94	79	70	52
1963	51	91	14	124	86	79	50
1961-63	43	84	12	103	78	70	52

[1] 1947-49—100.

TABLE 2.—*Iron ore handled over all railroad docks at Lake Erie ports*

Year	Gross tons	Index[1]
1947	40,063,288	102
1948	42,492,187	108
1949	35,448,453	90
1950	36,359,245	92
1951	43,175,303	110
1952	36,793,886	94
1953	46,783,501	119
1954	25,469,616	65
1955	38,233,099	97
1956	32,010,904	81
1957	35,163,821	89
1958	19,406,100	49
1959	18,583,659	47
1960	24,673,781	63
1961	18,169,198	46
1962	19,277,847	49
1963	20,272,175	52

[1] 1947-49—100.

Source: Ore & Coal Exchange, Cleveland.

TABLE 3

I. *Railroad iron ore docks at Lake Erie ports*

Cleveland, Ohio:
Erie-Lackawanna Railroad Company ore dock.
Pennsylvania Railroad Company ore dock.

Ashtabula, Ohio:
New York Central Railroad Company dock No. 1.
New York Central Railroad Company dock No. 2.
Pennsylvania Railroad Company dock.

Huron, Ohio:
New York, Chicago and St. Louis Railroad ore dock.

Lorain, Ohio:
Baltimore and Ohio Railroad Company ore dock.

Toledo, Ohio:
Lakefront dock (Baltimore & Ohio and New York Central).
Chesapeake and Ohio Railway Company ore and coal dock.

Conneaut, Ohio:
Bessemer and Lake Erie.

II. *Nonrailroad ore docks at Cleveland*[1]

American Steel and Wire Company (U. S. Steel Corp.).
Jones & Laughlin Steel Corporation (Otis Steel).
Republic Steel Corporation.

[1] For several years, actual movement of iron ore by rail from private docks at Cleveland has been limited to the dock of Republic Steel Corporation.

Appendix C

A. Section 1(5) of the Interstate Commerce Act, 49 U. S. C. § 1(5), provides:

> (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 15a(2) of the Interstate Commerce Act, 49 U. S. C. § 15a(2) provides:

> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Section 15a(3) of the Interstate Commerce Act, 49 U. S. C. § 15a(3) provides:

> (3) In a proceeding involving competition between carriers of different modes of transportation subject to this chapter and chapters 8, 12, 13 and 19 of this title, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates

of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this chapter and chapters 8, 12, 13 and 19 of this title.

The National Transportation Policy, 49 U. S. C. preceeding § 1, provides:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (Chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All the provisions of this Act (Chapters 1, 8, 12, 13 and 19 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

B. Section 8(b) of the Administrative Procedure Act, 5 U. S. C. § 1007(b) provides:

> (b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief or denial thereof.

Section 10(e) of the Administrative Procedure Act, 5 U. S. C. § 1009(e) provides:

> (e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise

not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Appendix D

LIST OF APPELLANTS

Baltimore and Ohio Railroad Company (The)
Bessemer and Lake Erie Railroad Company
Lehigh Valley Railroad Company
New York Central Railroad Company (The)
Norfolk and Western Railway Company
Pennsylvania Railroad Company (The)
Pittsburgh & Lake Erie Railroad Company (The)
Reading Company
Western Maryland Railway Company